

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 23, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2002-4-M
v.	:	A.C. No. 43-00396-05538
	:	
U.S. QUARRIED SLATE	:	
PRODUCTS, INCORPORATED	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

CORRECTED ORDER¹

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On October 10, 2001, the Commission received from U.S. Quarried Slate Products, Inc. (“Quarried Slate”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor’s proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its request, Quarried Slate, through its president, Andrew P. Andrushko, asserts that it timely submitted a request for a hearing on the proposed penalty assessment to the Department of

¹ This corrects errata set forth in the Order the Commission issued on January 17, 2002.

Labor's Mine Safety and Health Administration ("MSHA"). Mot. at 1 & attach. Andrushko, apparently proceeding pro se, contends that the sales manager at Quarried Slate "picked up" the proposed penalty assessment on April 20, 2001, but that Andrushko did not open it until April 26, 2001. *Id.* at 1. Quarried Slate's green card, requesting a hearing, was signed by Andrushko and dated May 25, 2001. *Id.*, attach. It was filed on May 31, 2001 by the Civil Penalty Office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). *Id.*, attach. On this basis, Andrushko claims that Quarried Slate timely filed its hearing request within the 30-day deadline. *Id.*; 30 U.S.C. § 815(a). Andrushko also asserts that Quarried Slate is a small operation with limited personnel and that Andrushko suffered a knee injury which severely limited his involvement at the company for over two months. Mot. at 1. However, he does not state when this disability period occurred. Quarried Slate attached a copy of its green card to its request to reopen.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Quarried Slate's position. In particular, the record is not clear on when Quarried Slate received the proposed penalty assessment, when it mailed its green card to MSHA, or how Andrushko's alleged knee injury affected the company's ability to timely return its hearing request. Therefore, in the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Doe Run Co.*, 23 FMSHRC 1012, 1012-15 (Sept. 2001) (remanding to judge where proposed penalty assessment did not reach correct manager in time due to internal mishandling); *Upper Valley Materials*, 23 FMSHRC 130, 130-32 (Feb. 2001) (remanding to judge where operator failed to file hearing request due to lack of familiarity with Commission procedures); *Landon Holbrook, empl. by Island Fork Constr., Ltd.*, 22

FMSHRC 158, 158-60 (Feb. 2001) (remanding to judge where Holbrook failed to timely file hearing request because he was busy caring for ill wife). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant U.S. Quarried Slate Product's request for relief. First, I note that the Secretary does not oppose the operator's motion. I also note that the operator is proceeding pro se, and the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Nor do I find any other circumstances that would render a grant of relief here problematic. Under these circumstances, I thus fail to see the need or utility for remanding this matter.

Theodore F. Verheggen, Chairman

Distribution

Andrew P. Andrushko, President
U. S. Quarried Slate Products, Inc.
Scotch Hill Road
Fair Haven, VT 05743

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006